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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

REPLY BRIEF FOR APPELLANTS.

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HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

(34,478)

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REPLY BRIEF FOR APPELLANTS.

MAY IT PLEASE THE COURT:

The question involved in this case is not the constitutionality of the Illinois Torrens Act in its general scope. That question was long ago decided by the Supreme Court of Illinois in the case of People v. Simon, 176 Ill. 165. As there pointed out, the original registration is made pursuant to a decree of a court having general equity jurisdiction in a proceeding to which all persons having any interest in the property are required to be made parties. Subsequent registrations, when made by the Registrar, *in accordance with*

the Act, in the main, are made pursuant to authorization of the owner, or in conformity with or after the entry of orders or decrees in judicial proceedings wherein all the requirements of due process are complied with.

The constitutional questions presented by this appeal are:

First: The power of a State Legislature, consistently with the due process clause of the Fourteenth Amendment of the Federal Constitution, to provide that a purchaser of registered land (if a purchaser for value without notice, and if there has been one intervening registration) obtains good title as against the former registered owner, in a case where title is registered by the Registrar, *contrary to the terms of the Act*, and in disregard of the safeguards which the Act erects to protect the owner in his title, and where the registration is effected without notice to the owner, who thus loses his title, not because of any act or omission of his own, but simply because the Registrar ignorantly, mistakenly or fraudulently, and in disregard of those provisions of the law intended for the protection of the owner, registered title in the purchaser. Such, in effect, are the provisions of Sections 40 and 42 of the Act in question, as construed and applied in this case by the court below.

Second: Whether Section 46 of the Act in question can be construed to be a consent on the part of one acquiring registered land to the above construction and operation of Sections 40 and 42 of the Act, and be given effect as so construed, consistently with the Federal Constitution, thereby precluding him from questioning the constitutionality of Sections 40 and 42 under the due process clause of the Fourteenth Amendment.

In a great majority of cases a certificate of title issued by the Registrar under the Act may have the conclusive effect prescribed by Sections 40 and 42 without violating any pro-

vision of the Federal Constitution, but we do submit that those sections, as construed by the court below and applied to the case of the appellants, are unconstitutional.

A decision in favor of appellants upon these constitutional questions will not result in the Torrens Act being declared unconstitutional as a whole, nor will it seriously affect either the efficacy of the Torrens system of land registration in Illinois or the merchantability of titles registered under the Act.

Such a decision will merely introduce an additional exception to those mentioned in the statute to the conclusiveness of the certificate. But the Supreme Court of Illinois has already said that the conclusive effect which the Torrens Act intended should be given the certificate is an "ideal which it was hoped the system would reach," and that the "practical question presented is how near the ideal may be approached in view of other established rules of property. The certificate of title is not always entirely conclusive. (In re Peters, 119 Minn. 96, 137 N. W. 390; Annotation, the Torrens Law, L. R. A. (1916D) 14 *et seq.*)" (In re Bickel, 301 Ill. 484, 492.)

Indeed, in the case which established the constitutionality of the Torrens Act in Illinois in its general scope (People v. Simon, 176 Ill. 165), an exception not found in the statute to the conclusive effect of the certificate was suggested by the court. The court there held (p. 177) that Section 26, which apparently attempted to make the decree of initial registration binding upon persons not parties to the suit, if an appearance and answer were not filed within two years after the entry of the decree, if given effect literally, would deprive persons of due process of law, and that the provision could not be sustained as a limitation law against one in possession of the property at the time of the commencement of the suit. The court then held that to the extent that the Act attempted to transfer property without due process of law, it could not be upheld.

Necessarily, under that decision, the certificate is not conclusive upon a person not a party to the suit who was in possession of the land at the time of the initial registration.

The question of the effect of a decree of initial registration and certificates of title issued thereunder as against one who had a title of record and was in possession at the time of the commencement of the registration proceeding, and who was not a party thereto, was determined by the Supreme Court of Illinois in an opinion delivered on April 17, 1930, in the case of Sheaff v. Duplissis, *et al.* The court there held that a decree directing registration was void as against a person required by the statute to be made a party, who, in fact, was not made a party. While in that case the person who was not made a party was in possession, the opinion of the court is that under the Illinois statute, properly construed, a decree in such a proceeding is void as against persons not parties who were required by the Statute to be made parties, the court holding that it was not intended "to attempt a modification of the rule which required notice before judgment by a court."

While the court therefore found it unnecessary in that case to decide constitutional questions argued on the subject of due process of law, the court remarked:

> "It is an elementary principle of law, for which the citation of authority is superfluous, that no adjudication of a court which may deprive a person of his liberty or property is of any validity against him unless it has been rendered with due process of law, which requires notice and an opportunity to be heard."

We submit that if an adjudication of a court made without notice and an opportunity to be heard is void, so also is a determination, having the same practical effect, made by an administrative officer without notice. Under that decision, there is introduced an exception not found in the Statute to the conclusiveness of a Torrens Certificate. And we further

submit that it will also be necessary to introduce exceptions to the conclusiveness of such certificates in all cases where required in order to give due effect to the Federal Constitutional provision prohibiting a State from depriving a person of his property without due process of law.

This was done in California when it was held that a certificate of title was not conclusive in favor of a purchaser who relied thereon, as against the holder of an unregistered easement who, being in possession, was not made a party to the initial registration proceeding.

Follette v. Pac. L. & P. Corp., 189 Calif. 193, 214-5.

As the time within which application may be made for a rehearing in the case of Sheaff v. Duplissis has not expired, and the case, therefore, is subject to further consideration by the Supreme Court of Illinois, the opinion is not yet published. For the purpose of making the whole opinion available to the court, we intend to move this court for leave to file a certified copy thereof.

As we have already mentioned, on pp. 24 and 25 of our original brief, the Supreme Court of Illinois by its decisions has introduced additional exceptions to the conclusiveness of such certificates.

Exception from the conclusive effect of the certificate in cases of forgery is made by statute in Massachusetts, Ohio, North Carolina, Tennessee, and England. (See pp. 13 and 14 of our original brief.)

Other exceptions from the conclusive effect of certificates of title which probably will be introduced by the courts (where not already provided by statute) in order to give effect to State and Federal constitutional provisions, requiring due process of law before divesting one of his title to real estate, and because of the dual form of government in force in the United States, may be mentioned:

1. A transfer made by a Registrar from a living person to his supposed heirs or devisees upon false evidence of death or pursuant to a decree in a cause to which the living person was not made a party.
2. A transfer made by a Registrar to one of two joint tenants upon false evidence of death of the other.
3. Registration by the Registrar of title to property which was actually never brought under the Act.
4. Conflicting certificates of title covering the same property.
5. Liens of the Federal Government or of others procured or asserted under Federal laws and not appearing on the register.
6. Pending proceedings in Federal Courts affecting the title not appearing on the register.

Unlike the Illinois Torrens Act, the Torrens Acts of all the other States, except Nebraska and Oregon, contain a statutory exception of liens, claims or rights arising or existing under the laws or Constitution of the United States which the statutes of the State cannot (or in some instances do not) require to appear of record.

Notwithstanding the exceptions created by the statutes and the decisions above mentioned and those which probably exist independently of them, the Torrens System has continued to be operative in all of the States in which it was adopted.

Much consideration is given in the brief for the appellees to the power of the State to enact laws to secure title to real estate, but the sections of the Torrens statute involved in this case, as they have been construed by the Supreme Court of Illinois, instead of securing an owner in his title to real estate, jeopardize his title once he has purchased, and make it a title which, in effect, is held at the will of the Registrar and which is not entitled to the protection given to other prop-

erty by the State and Federal Constitutions. These provisions of the statute, as so construed and applied, allow one's title to be wrested from him without notice or consent and without opportunity for hearing.

The sections of the statute in question really are inserted for the purpose of facilitating transfers of title. They have not in view the protection of the title of the registered owner but the protection of one who intends to purchase his title.

The question, therefore, is really as to the power of the State to transfer property from one private owner to another without notice or hearing in order (it is claimed) to make efficient a system for the simple and rapid transfer of title to real estate. Is not that object as well secured by compelling resort to the indemnity fund by the purchaser who has relied upon a false certificate and who, if our view of the case is correct, has never acquired an interest in the land which entitles him to the protection given to property rights by the Federal Constitution, rather than by depriving the true owner of his property and compelling him to resort to the indemnity fund or action against the county?

The appellees, in several instances, refer to appellants' right under Section 101 of the Torrens Act to resort to the indemnity fund, but if we are correct in our conclusion that the appellants are not deprived of their property by a registration based upon a forged deed, there is no right on the part of appellants to resort to the fund, because they have sustained neither loss nor damage, nor have they been deprived of any right or interest in their land or precluded from bringing an action for the recovery thereof.

ARGUMENT.

I.

THE QUESTION OF JURISDICTION.

A.

Appellants seasonably invoked the protection of the Fourteenth Amendment to the Federal Constitution. The questions arising thereunder, in fact, were considered and decided by the Supreme Court of Illinois.

1. *Appellants seasonably invoked the protection of the Fourteenth Amendment.*

Appellants, in their original brief in the court below (p. 24 thereof) contended that if Sections 40 and 42 of the Torrens Act should be construed as they were afterwards construed by the court below they were unconstitutional and prohibited by Section 2 of Article II. of the Illinois Constitution and by the Fifth Amendment to the United States Constitution.

The reference to the Fifth Amendment, instead of the Fourteenth, was inadvertent. In the reply brief filed by appellants in the court below (p. 9), the pertinent provision of Section 1 of the Fourteenth Amendment was quoted, and reliance was placed thereon. After the first opinion of the court, appellants filed their petition for rehearing, on page 7 of which they again referred to the Fourteenth Amendment and invoked its protection as against Sections 40 and 42 of the Act as construed in the opinion which had been filed. (Certified copies of appellants' reply brief and petition for rehearing were filed in this Court as appendices to the Ap-

pellants' Statement as to Jurisdiction on Appeal.) This petition for rehearing was granted and the case reconsidered, but the same opinion was later refiled as the opinion of the court, one justice thereof dissenting. (R. 16, 17.)

The Supreme Court of Illinois has held that the granting of a rehearing in a case pending before it has the same effect as the granting of a new trial in the trial court, and that it operates to vacate the judgment, and the whole case is subject to review and is open for argument upon *any question* in the case.

Becker v. Billings, 304 Ill. 190, 205.

Colesar v. Star Coal Co., 255 Ill. 532, 543.

Public Utilities Com. v. P. C. C. & St. L. R. R. Co., 290 Ill. 580, 584.

The underlying reason for those decisions undoubtedly is that under the rules of the State Court, when a petition for rehearing is granted, opportunity is given to answer the petition for rehearing, so that all parties have an opportunity to be heard upon the questions presented by the petition for rehearing.

There is thus left no ground for the alleged inference claimed by counsel that the court below refused to consider the Fourteenth Amendment for the reason that it was mentioned for the first time in the reply brief or in the petition for rehearing.

The authorities cited under Points (1) and (2) on page 24 of the appellees' brief, therefore, are not in point where a rehearing has been granted. Under the authorities and practice of the Supreme Court of Illinois, and its decisions, the constitutional questions in this case under the Fourteenth Amendment were timely presented before that court.

2. *The constitutional questions under the Fourteenth Amendment, in fact, were considered and decided by the Supreme Court of Illinois, and therefore this court has jurisdiction to review the judgment of that court on those questions.*

Where the State Court, by its opinion, considers and decides a Federal question, this Court will regard the question as duly presented.

Miedreich v. Lauenstein, 232 U. S. 236, 243.
Hill v. Smith, 260 U. S. 592, 594.
North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 257.

Reference may be made to the opinion of the Supreme Court of the State for the purpose of determining the Federal questions presented to and decided by that court.

Gross v. United States Mortgage Co., 108 U. S. 477, 486.

Applying the rules announced in the foregoing cases to the opinion of the court below in this case, we submit it appears that that court considered and decided the application to the case of that clause of the Federal Constitution which prohibits a State from depriving any person of his property without due process of law, and that the reference in the opinion to the Fifth Amendment was merely inadvertent.

It is said in the opinion (Rec. 22):

> "Appellants insist that if this construction is placed upon the statute it is unconstitutional, for the reason that it is in violation of section 2 of article 2 of the State constitution and the fifth amendment to the Federal constitution, which provide that no person shall be deprived of life, liberty or property without due process of law. The principal grounds for claiming that the *statute* is unconstitutional are, *that there is no provision in it for*

notice to appellants so they could have the opportunity to appear and defend their title, and that because no opportunity was given them to defend they were deprived of their property without due process of law." (Italics ours.)

After considering the questions at some length, the court says (R. 25):

"The statute is not unconstitutional because it deprived appellants of the title to their property without due process of law."

While reference is made to the Fifth Amendment, it will be noted that the court states the ground of unconstitutionality relied upon by appellants to be that the *statute* contains no provision for notice to appellants so that they could have the opportunity to appear and defend their title, and therefore "they were deprived of their property without due process of law." (R. 22.) From the foregoing quotation, it appears the State Court considered that appellants were relying on that provision of the Federal Constitution which operates to prohibit a State from depriving a person of his property without due process of law, and it was that contention of appellants, as well as the contention that such legislation was contrary to the State Constitution, that was decided adversely to appellants when the court said: "The statute is not unconstitutional because it deprived appellants of their property without due process of law." (R. 25.)

If reference is made to the briefs and petition for rehearing in the State Court on file herein, the inadvertent error of the court in referring to the Fifth instead of the Fourteenth Amendment is readily explainable. But we submit that, regardless of the clarification of the opinion which results from a perusal of the briefs and petition for rehearing, it appears sufficiently from the opinion itself that the State Court considered the application to the case of that provision of the Federal Constitution, whatever it is, which oper-

ates to prohibit a State Legislature passing a law depriving a person of property without due process of law.

This Court has held that, in ascertaining what the State Court has decided, consideration should be given to all of the language of the opinion of that court, and to the real substance and effect of that court's decision.

McCullough v. Virginia, 172 U. S. 102, 116-7.

If that is done in the instant case, then we submit, under the authorities first cited under this heading, this Court has jurisdiction to review the judgment of the court below in this case.

B.

The State Court's judgment is not based upon an independent non-Federal question.

It is contended by appellees that the State Court's judgment is based on grounds which do not involve the decision of a Federal question, and so this Court has no jurisdiction to review that judgment. The first argument advanced in support of this contention is that appellants, by purchasing registered property are estopped to question the constitutionality of the Act, and that the State Court so decided, and, such a decision is upon an independent non-Federal question. (Appellees' Brief, p. 26 *et seq.*)

This point is answered in our original brief. (Point F, p. 57 *et seq.*)

To the authorities there cited, we add the case of Union Pacific R. R. Co. v. Public Service Commission, 248 U. S. 67, 69, where it is held that under the later decisions, "it is the duty of this court to examine for itself whether there is any basis in the admitted facts or in the evidence, when the facts are in dispute, for a finding that the Federal right has been waived."

It is also contended (Appellees' Brief, p. 26) that the State Court's decision was placed upon an independent non-Federal ground, because the opinion states that "Appellants lost their property by reason of their failure to safeguard their interests and not by reason of any defect in the statute." (R. 25.)

Two sufficient answers may be made to this contention: *First,* that the quoted sentence is not a *decision* by the State Supreme Court of an independent non-Federal question; and, *Second,* if it were, it is so plainly untenable that it will be disregarded by this Court.

We submit that a reading of the State Court's opinion discloses that its decision was based upon the proposition that the agreement implied under Section 46 was binding upon appellants and operated as a consent by them to Sections 40 and 42 of the Act, and, because of such consent, the statute did not unconstitutionally deprive appellants of their property without due process of law, and that the State Court did not decide upon the equities, if any, arising from the fact that appellants entrusted their certificate of title to Napletone.

There was no consideration given by the State Court to the rule suggested by counsel for appellees on page 33 of their brief, that where one of two innocent persons must suffer by the fraud of a third person, he who puts it in the power of the third person to perpetrate the fraud must bear the loss, or to the equities of the case between the appellants and the appellees. The sentence of the opinion of the State Court quoted by appellees as a decision upon a non-Federal question was merely "a make-weight, which adds nothing to the substantial basis" for the decision. (Hartford Life Ins. Co. v. Barber, 245 U. S. 146, 150.)

This appears from the statement in the opinion that the Wilborns "took a good title *unless* the statute is unconstitutional." (R. 22.) Conversely, if the statute was unconstitutional, appellants retain their title to the property.

What the court undoubtedly had in mind, when it made the remarks relied upon by counsel for the appellees, was not a protection which the statute affords, but a so-called protection based on the mere assumption that the probabilities are that without the duplicate certificate the Registrar would not have made the transfer; but it is apparent that the same arguments apply to the absence of a deed. The owner has a right to assume that not only the duplicate certificate of title, but also his deed, will be required before a transfer is effected. The conclusiveness of the certificate of the Registrar destroys all the safeguards prescribed in the Act.

The rule that where the decision of a State Court may rest upon a non-Federal ground, this Court will not take jurisdiction to determine the Federal question, has no application, where the non-Federal ground might have been considered by the State Court, but was not.

Grayson v. Harris, 267 U. S., 352, 358.

Rogers v. Hennepin County, 240 U. S., 184, 188.

In St. L., I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265, where there were some expressions in the opinion of the State Court upon which one might conjecture that the State Court was deciding the case on other than the Federal question, the Court said (p. 276):

> "Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect."

In another case, where it was doubtful whether the State Court intended to place its decision upon a non-Federal ground apparently mentioned in the opinion, jurisdiction of the case was assumed by this Court.

German Savings & Loan Society v. Dormitzer, 192 U. S. 125, 127.

And if the State Court's decision had been placed on such a basis as asserted, it would be manifestly untenable. Certainly appellants were in no worse position than the owner of stock certificates or written instruments who entrusts them, unendorsed, to another, who in turn forges the owner's name thereto and transfers them to innocent purchasers for value. In such cases, it is uniformly held that title does not pass under the forged endorsement, although accompanied by delivery of the genuine certificates or instruments.

Unity Banking & Saving Co. v. Bettman, 217 U. S. 127, 135.

Penn. Co., etc. v. Franklin Fire Ins. Co., 181 Pa. 40, 48-9.

II. Cook, Corporations, Sec. 366 (8 ed.).

Atherton v. Michigan Guaranty Corp., 237 Mich. 133, 136.

Fay v. Slaughter, 194 Ill. 157, 169.

Graves v. American Exchange Bank, 17 N. Y. 205, 208.

Prudential Ins. Co. v. National Bank of Commerce, 227 N. Y. 510, 514-5.

Gustin-Bacon Co. v. First National Bank of Englewood, 306 Ill. 179, 182-3.

Grand Lodge of Kansas v. State Bank, 92 Kan. 876, 882, *et seq.*

This Court has determined that its jurisdiction is not ousted by the determination of the cause by the State Court on a plainly untenable non-Federal ground. To permit this would be to permit the State Courts to fritter away the jurisdiction given to this Court to review their judgments.

Ward v. Board of County Commissioners of Love County, 253 U. S. 17, 22.

Terre Haute and Indianapolis R. R. Co. v. Indiana, 194 U. S. 579, 589.

II.

THE QUESTION OF ESTOPPEL.

It is urged in the brief of the Registrar of Titles that Section 46 of the Act, which the court below construed as an implied agreement running with the land, that the same shall be subject to the terms of the Act and to all amendments and alterations thereto (R. 22, 23) is not a consent to waive constitutional guarantees, but on the contrary, when land is brought under the Torrens System it is an exchange of old rights and liabilities for the new rights and liabilities which are created under the system, and when constitutional provisions are invoked they are to be read with reference to the rights under the new system, and all rights acquired under the new system come with any conditions annexed thereto by the Legislature. (Registrar's Brief, pp. 66, 67, 95.)

There is no essential difference between this contention and the contention that the State can attach, as a condition to the exercise of a privilege which it may withhold at pleasure, the waiver of rights guaranteed by the Federal Constitution.

We may concede that the State may classify real estate into two classes—registered and non-registered—and may enact different rules regulating their transfer, but both classes of real estate are species of property which may be bought and sold. Every person has the privilege (in fact, the constitutional right) to acquire either species, and we submit both species are property entitled to the protection of the due process clause of the Fourteenth Amendment, and the State may not compel in the case of either species a consent by the purchaser to waive rights guaranteed by the Constitution of the United States as the price for exercising the privilege or right of acquisition. This is particularly true where no opportunity is afforded to withdraw land from the operation of the Torrens Act once it has been registered.

Expressed in other words, the contention so made by the Registrar is that the State has power to classify property, and by the exercise of its power of classification, to create one class of property which is not guarded and protected by the Federal Constitution. The answer to the Registrar's contention, we submit, will be found in those authorities which are mentioned in our original brief, Point C, pp. 34-43.

It is argued in appellees' brief (p. 28) that appellants accepted the benefits of the Torrens Act and cannot now, therefore, challenge its validity.

As we pointed out above, we do not question the constitutionality of the Torrens Act in its general scope; what we do question is the constitutionality of certain sections thereof as construed and applied by the court below. We do not contend for the invalidity of any of the provisions of the statute for initial registration, nor of those whereby the Registrar, upon presentation of a genuine deed and the duplicate certificate of title, is empowered to transfer title and issue a new certificate. We do not contend that Sections 93 and 94 of the Act, under which the petition in this case was filed, are unconstitutional.

In practically every instance where this Court has held invalid a waiver, or a consent or agreement to the surrender of rights secured by the Federal Constitution, the party asserting the invalidity of such waiver or consent had, himself, invoked or availed of the privilege granted by the Statute which imposed such waiver or consent as a condition to the exercise of such privilege. This is true in the following cases:

W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 468.
Power Mfg. Co. v. Saunders, 274 U. S. 490, 496.
Frost Trucking Co. v. R. R. Commission, 271 U. S. 583, 593.
Barrow Steamship Co. v. Kane, 170 U. S. 100, 110-1.

Southern Pacific Co. v. Denton, 146 U. S. 202, 207.
Barron v. Burnside, 121 U. S. 186, 200.
Insurance Company v. Morse, 87 U. S. 445, 451.
International Paper Co. v. Massachusetts, 246 U. S. 135, 141.
Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 36.

The case of W. W. Cargill Co. v. Minnesota, *supra*, cited and approved in the recent case of Power Co. v. Saunders, *supra*, involved the constitutionality of certain provisions of the Minnesota statute licensing and regulating grain elevators and warehouses. The statute contained a provision similar to Section 46 of the Illinois Torrens Act, and provided that "every person, company or corporation receiving such license shall be held to have accepted the provisions of this Act, and thereby to have agreed to comply with the same." This Court held untenable the contention there asserted that by accepting a license under the Act the licensee would estop himself from asserting the unconstitutionality of any of the provisions of the Act, and said (p. 468): "the acceptance of a license in whatever form will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute * * * that are repugnant to the Constitution of the United States." This language was quoted in Power Mfg. Co. v. Saunders, 274 U. S. 490, 496.

This subject is also considered in our original brief under Point C (pp. 34-43).

This case is unlike Booth Fisheries v. Industrial Commission, 271 U. S. 208, where there was a purely elective statute giving one the choice of accepting its provisions or not and allowing a withdrawal from the election at yearly intervals and not requiring, as a price of refusal to accept the provisions of the Act, the waiver of any privilege or right whatsoever.

The same is true of St. Louis Malleable Casting Co. v. Prendergast Construction Co., 260 U. S. 469, and Grand Rapids and Indiana Railway Co. v. Osborn, 193 U. S. 17.

The case of Pierce Oil Co. v. Phoenix Refg. Co., 259 U. S. 125, relied upon by counsel for appellees on the question of estoppel, is not in point, for the reason that the Pierce Company had no authority to construct pipe lines within the State and necessarily across the public highways of the State for the private use of the Pierce Company only. Its only authority was under a statute which provided that the lines when constructed should be open for public use as a common carrier. Therefore, when the company obtained authority to construct its pipe lines for the purposes and upon the conditions imposed by the statute, it voluntarily agreed to be bound thereby. Neither under the statute, nor independently of it, did the company have any right to construct pipe lines within the State for its private use only. It was authorized to construct its lines for private *and* public use, and when so constructed, could not deny the right of the State to direct that the lines be used as thus authorized.

We also here observe that the Torrens Act does not give the owner, or one intending to purchase from him, the right to withdraw the land from the operation of the Act. One intending to purchase registered land, therefore, is required, under the construction of the Act adopted by the court below, either to submit to the Act or forego the privilege of purchasing the real estate. When it is considered that the Supreme Court of Illinois in Evans v. Chicago Title and Trust Company, 317 Ill. 11, on p. 19, said (referring to The People v. Simon, 176 Ill. 165) that there was no reason why the Legislature could not have chosen to make the Torrens System compulsory upon the owners, the consequence of the opinion of the State Court in this case becomes at once apparent. The way is then left open for Illinois to prescribe a system of recording or registering titles to real estate under which it

may require, as a condition to the acquisition of any real estate within the State, the waiver of all the rights secured thereto by the Constitution of the United States.

Nor does the fact that appellants sought relief under Sections 93 and 94 of the Torrens Act, admitting the validity of the Torrens Act in its general scope and the right of the court to proceed under those sections, and asking only that certain sections of the Act be construed so as to give them the relief which they sought, or if otherwise construed that they be held to violate the provisions of the State and Federal Constitutions, estop them from asserting such constitutional questions.

Whether the court below would construe Sections 40 and 42 of the Act as giving conclusive effect to a Registrar's certificate of title where the title was transferred by the Registrar contrary to the terms of the Act, without notice or hearing, was a matter unknown to appellants and to all others who purchased registered land until the opinion of the court below in this case. Appellants' petition alleged that the title to the premises in question had passed to appellants and that a certificate registering the title in appellants was duly issued by the Registrar of Titles. (R. 1, 2.) All of this amounted to an allegation that the certificate of title of appellants had been issued in accordance with the terms of the Act by the Registrar and not contrary thereto.

It would be strange indeed if the fact that appellants filed their petition under those sections of the Act should bar them from the relief which they seek in this proceeding. The questions which they raise are as separate and distinct from the provisions of the Act under which they filed their petition as though contained in an independent Act. It would be surprising, if the chancery law of the State were codified into a single enactment or chapter of the statutes in which, among other things, the various equity bills which might be filed were classified and other provisions made relating to

equity jurisdiction and the form and conduct of proceedings in equity causes, if one could not in an equity suit brought under such statute question the constitutionality of one of the sections of the statute which in no way related to the form of proceeding which was filed by him.

It is contended under Point E of Appellees' Brief (pp. 33 and 34) that the State Court's decision in this case is based upon a non-Federal question, viz.: the principle that where one of two persons must suffer by the fraud of a third, he who put it in the power of the third person to perpetrate the fraud must bear the loss. We have pointed out under Point I of this Reply Brief that the State Court's decision was not *based* upon any such ground, and therefore, this court has jurisdiction to review the judgment. We do not understand that it is the practice of this Court in cases coming to it on appeal from the highest court of the State to decide the case upon a question of local law not made a basis of decision by the State Court.

III.

APPELLANTS WERE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

That appellants were deprived of their property without due process of law (apart from the consent feature introduced by Section 46 of the Act) was not very much mooted in the court below and apparently was assumed by that court. The question is considered under Point A of our original brief (p. 13), but in view of the rather extended argument of appellees on this question we make the following additional observations.

We do not question the power of the State to regulate the tenure of real property within its limits, the modes of its acquisition or transfer, or the rules of its descent or the right of testamentary disposition thereof. We do contend, how-

ever, that when one has lawfully acquired title to real estate in accordance with the law of the State he cannot be deprived of such title without his consent by any State agency without due process of law.

It is argued on page 41 of appellees' brief that neither Sections 40 nor 42, nor any other section of the Act, purports to take the property of one person and give it to another. In the court below that construction was contended for by appellants, but their construction was rejected by that court. Sections 40 and 42 of the Act, as construed and applied by the court below, operate to make conclusive a certificate of title issued by the Registrar to one who has purchased in good faith without notice, for value, from the person in whose name title is registered and thus preclude the true owner from asserting his title against such purchaser. To make the recitals of any certificate (not the result of a hearing after notice) conclusive of the rights of parties in subsequent litigation without an opportunity to the party whose rights are to be affected to show the true facts, is a violation of due process. (See authorities pp. 18 and 20 of our original brief.) The rule last mentioned has been applied in this Court to State statutes purporting to make tax deeds issued by public officers conclusive evidence of title and conclusive that all proceedings required or directed by law in relation to the levy, assessment and collection of taxes have been had and done in accordance with law.

Marx v. Hanthorn, 148 U. S. 172, 182.

Similar statutes making tax deeds issued by State officials conclusive evidence of their own validity have uniformly been held unconstitutional, as being violative of due process. See cases in Note, 30 Am. L. Reports, 16.

What was said in Lufkin v. Galveston, 73 Tex. 340, in holding such a statute invalid, is strikingly applicable to the instant case, viz. (p. 342):

> "To say that this could be done would be to hold that the owner could be deprived of his property by the arbitrary action of an officer, proceeding under the pretense of lawful authority. This would be simply to enable one man to transfer the property of another for a purpose not authorized by law, and would not be according to the due course of the law of the land."

And as said in Cairo & F. R. Co. v. Parks, 32 Ark. 131, 145:

> "If the legislature has power to do this, then that provision in the Bill of Rights which ordains that 'no one shall be deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land,' is a dead letter, because to deprive the citizen of the right to protect his property by showing that it has been taken from him contrary to law is, in effect, denying to him the protection of the law."

We also refer to Schlessinger v. Wisconsin, 270 U. S. 230, 239, 240, on the general question of the power of the State, consistently with the due process clause, to provide by legislation for a *conclusive* presumption.

A.

To constitute due process, notice is required in any proceeding, administrative or judicial, where a person's property rights are to be affected, except in those few instances where notice is dispensed with by settled ancient usage.

Counsel for appellees contend (Brief pp. 37-50) that from time immemorial the laws have provided what was necessary for the transfer of title from one person to another, and that there is nothing unreasonable nor unconstitutional in making the Registrar the one whose duty it is to keep all records, to make all entries, to issue all certificates of title, and

"to *determine* whether the transferor can legally convey the lands, to *determine* whether the proposed transfer conforms with the law."

In this connection, counsel state that the statute makes provision for a hearing before the Registrar whenever any transfer is to be made, and that under Section 5 he is authorized to appoint lawyers as examiners of title, and that by Sections 93-94 his actions are subject to proceedings for correction by the Circuit Court.

We make no point that the Registrar can not be authorized by statute to conduct a hearing in the ordinary case of a voluntary transfer by deed from the owner, but even if it be held that Sections 47 and 54 of the Act in effect provide for a hearing, nevertheless, no *notice* of such hearing is required by the statute to be given to the owner and no notice in fact was given in the instant case to these appellants. And we assert that, in the absence of a genuine deed executed by the owner, a hearing without notice and without any provision for notice, so that one whose rights are to be affected has no opportunity to be heard, is wholly ineffectual as constituting due process of law. If the owner has executed and delivered a deed, no further notice is required, because the deed is authority from the owner to the Registrar to make the transfer; but where the transfer is made without the owner's deed and without notice to him, no *ex parte* hearing before the Registrar can constitute due process of law.

The question of what constitutes due process of law was exhaustively considered by this Court in Twining v. New Jersey, 211 U. S. 78, 110-112. This Court there declined to give a comprehensive definition of the phrase "due process of law," but stated it preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions of cases as they arise. The Court, however, said that there were certain general principles, well settled, which narrowed the field of discussion and

might serve as helps to correct conclusions. These principles grew out of the proposition universally accepted by American courts that the words "due process of law" are equivalent in meaning to the words "law of the land."

From a consideration of the meaning of the words, in the light of their historical origin, the Court there drew the following conclusions. (pp. 100-102)

> "First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. * * * 'A process of law,' said Mr. Justice Matthews, commenting on this statement of Mr. Justice Curtis, 'which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country.' * * *
>
> "Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment. * * *
>
> "Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government. This idea has been many times expressed in differing words by this court, and it seems well to cite some expressions of it. The words 'due process of law' 'were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private

rights and distributive justice.' * * * 'This court has never attempted to define with precision the words 'due process of law' * * * It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' "

The Court then proceeded to consider some of those principles which are fundamental principles of liberty and justice, inherent in the very idea of free government and the inalienable right of a citizen of such a government, which are protected by the due process clause and which cannot be disregarded by any State. (See pp. 102 *et seq.*)

The Court then considered the question of the essential elements of due process of law and said (p. 110):

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction * * * *and that there shall be notice and an opportunity for hearing given the parties.*" (Italics ours.)

In Garfield v. Goldsby, 211 U. S. 249-262, this Court held that there is no place in our constitutional system for the exercise of arbitrary power by a public official.

At page 262 of the opinion, the Court said:

"In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an *administrative or judicial proceeding* cannot be deprived of them *without notice* and an opportunity to be heard.

The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded *is of the essence of due process of law.*" (Italics ours.)

This was said in one of the Indian allotment cases where, after the Secretary of the Interior had approved a list containing the name of a person found by the Dawes Commission to be entitled to enrollment for distribution, that officer,

without giving the person notice and an opportunity to be heard, struck his name from the list.

The principle announced in Twining v. New Jersey, and reiterated in Garfield v. Goldsby, that notice and an opportunity for a hearing are essential to due process of law, whether in an administrative or judicial proceeding, has been adhered to in many cases decided by this Court.

Jacob v. Roberts, 223 U. S. 261, 265.
Simon v. Craft, 182 U. S. 427, 436.
Baker v. Baker, Eccles & Co., 242 U. S. 394, 403.
Coe v. Armour Fertilizer Works, 237 U. S. 413, 425.
Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 123.

In tax cases and in special assessment proceedings it has been uniformly held that notice or an opportunity to review is necessary and "must be provided as an essential part of the statutory provision."

Central etc. Railway Co. v. Wright, 207 U. S. 127, 138.
Londoner v. Denver, 210 U. S. 373, 385.
Turner v. Wade, 254 U. S. 64, 68, 70.
St. Louis Land Co. v. Kansas City, 241 U. S. 419, 430.

We again note for the Court's consideration the quotation on p. 4 of this reply brief from the opinion of the Supreme Court of Illinois in Sheaff v. Duplissis, *et al.*, regarding the necessity of notice and an opportunity to be heard as a requirement of due process in a proceeding under the Torrens Act.

But counsel argue that the action of the Registrar is "subject to proceedings for correction by the Circuit Court" under Sections 93 and 94, and, therefore, the owner is given

an opportunity to correct the action of the Registrar and that this constitutes due process. If the owner were, in fact, given such an opportunity and were permitted to avail of it, this would no doubt constitute due process, though he had no prior notice of the proceeding leading up to the transfer; but such is not the statute as construed and applied by the decision of the court below in this case. That is exactly what appellants attempted to do. They sought in this proceeding to have set aside and corrected the unauthorized action of the Registrar in making the transfer, but were met at the threshold by the contention, which the court below sustained, that the certificate of title was made conclusive and therefore they were not entitled to obtain such relief in this or in any other proceeding.

The provision for review of the Registrar's action is a mere gesture if, under this statute, the conclusiveness of the certificate bars any inquiry upon such an application.

B.

Protection, consistent with the due process clause of the Constitution, is not afforded to an owner by the retention of his duplicate certificate of title.

Appellees make the further contention that an owner is given ample means of protection and can always obtain a hearing before the Registrar by holding on to his certificate of title. As we pointed out on pp. 21-23 of our original brief, the retention by the owner of his duplicate certificate of title is no more a legal protection against an unauthorized transfer than is his failure to execute a deed. It appears from the construction which was given to Sections 40 and 42 that there was no means by which appellants could have safeguarded their interests so as to protect them against an unauthorized transfer by the Registrar. It is idle to say that appellants could have safeguarded their property by retaining posses-

sion of the duplicate certificate of title when the court held, as it did, that purchasers for value, in good faith, are not required to inquire into the title prior to the date of the certificate of title of the registrant from whom they purchase. (R. 22.)

At page 49 of appellees' brief, counsel say:

> "The act in the case at bar certainly is analogous. It says to the owner, '*Hold on to your duplicate certificate of title; no transfer of title can be made without its surrender.* * * *'
>
> "And to the owner who alleges that he was not before the registrar of titles when his land was registered in another, there is the reply, 'But it was your duty to be there.' To insure his being called before the registrar all that he need do is to safely keep his duplicate certificate of title. *It is his duty to keep it.*"

This, we submit, is a most palpable fallacy. It is utterly untrue that, under the Act as construed in this case, "no transfer of title can be made without its surrender", or that the owner's retention of his certificate "insures his being called before the registrar." The statute, as construed, does not so provide. The statute says to the owner (Secs. 46, 54): "Hold on to your deed and also your certificate, for without these being presented to the Registrar he shall have no *authority* to make a transfer." But the statute as construed also says (Secs. 40, 42) that if the Registrar *does* make a transfer without such authority, his certificate shall nevertheless be conclusive in favor of a *bona fide* purchaser, notwithstanding neither the owner's deed nor his certificate was produced as required by Sections 46 and 54. How idle, therefore, it is to assert that the owner cannot be deprived of his property under this Act if he holds on to his certificate. It may be asserted with equal force that he cannot lose his property if he holds on to his deed.

It is as easy to forge a certificate as it was in this case to forge a deed. An owner's duplicate certificate might be

securely locked away in his safety-deposit vault—and still, under the decision by the State Court that a subsequent certificate is conclusive against him, his land might be stolen from him by the simple trick of forging a duplicate certificate or affidavit of loss, presenting it with a forged deed, obtaining a new certificate from the Registrar and then conveying to a purchaser without notice, or by inducing the Registrar to make the transfer without any certificate, forged or otherwise. In other words, the conclusiveness of the certificate of the Registrar destroys all the safeguards otherwise prescribed in the Act.

Under Sections 47 and 54 of the Act, the Registrar has no more authority to register a transfer upon the presentation of a forged deed, accompanied by a duplicate certificate, than he has to make a transfer upon the presentation of a genuine deed without the surrender of the duplicate certificate of title or the affidavit of loss required by Section 58. If, in the absence of a deed, the Registrar's certificate is made conclusive by the statute, then the statute fails to give an owner the protection which the Constitution guarantees. The owner has as much right to assume that the transfer will not be made without his deed as he has to assume that it will not be made without his certificate.

To constitute due process of law the *statute* itself must afford protection and not the *probable* action or non-action of the Registrar. Due process is not afforded by the mere probability that the retention of the certificate or the failure to execute a deed will prevent an unauthorized transfer by the Registrar.

The principle is somewhat analogous to the cases cited by this Court in Coe v. Armour Fertilizer Works, 237 U. S. 413, 424-5, where in respect to a statute which did not provide for a notice in any form, but where the party in fact received notice, it was held that it was not sufficient that the party have notice, but to constitute due process of law, the statute itself must provide for notice.

A similar ruling was made by this court in the late case of Wuchter v. Pizzutti, 276 U. S. 13, 19, 24.

It is urged by appellees that the owner is required to attend before the Registrar if he desires to be heard in the matter of the transfer; but, as pointed out above, due process requires in a matter such as this that the owner be given notice to attend and an opportunity to be heard. Until the owner has executed the deed, there is no occasion for him to attend the Registrar in the matter of a transfer, which, by the very terms of the statute, the Registrar cannot lawfully make. A person is never required to attend a court until the court has acquired jurisdiction over his person. An owner is certainly not required to anticipate that the Registrar is going to make a transfer except as authorized by the terms of the Act.

C.

Notice, as a requisite of due process, may be dispensed with only when not required by settled ancient usage, which prior to the adoption of the Constitution and its amendments constituted the "law of the land."

None of the cases cited by counsel, except two which are distinguishable on other grounds and will be hereafter mentioned, support the proposition that a hearing under the Torrens Act conducted by the Registrar without notice, is due process of law. In all of the cases cited in appellees' brief, except the two above mentioned, the law provided for a hearing before a properly constituted body and an opportunity to be heard.

The two cases cited in appellees brief on due process where there was no notice given are the cases of Den v. Hoboken Land & Improvement Co., 18 How. 272, 280, and Miedreich v. Lauenstein, 232 U. S. 236, 247.

Both of these cases, come within the first class of cases mentioned in Mr. Justice Moody's opinion in Twining v. State of New Jersey, 211 U. S. 78, page 100, *i. e.*, proceedings sanctioned by settled ancient usage and therefore "the law of the land."

That test was established by the opinion in the Hoboken Land & Improvement Co., case, where the court after careful consideration decided that the common law and statutes of England for centuries had established the validity of process similar to that there under consideration.

The Miedreich case is but another illustration of the same doctrine. The question there involved was whether one had been deprived of his property without due process, contrary to the Fourteenth Amendment, by a decision of the State Court that he could not impeach as false a sheriff's return of service in a proceeding under which his land was sold and by so impeaching the return set aside the proceedings had in the cause. One need only consider for a moment the great age of the rule of the common law as to the conclusiveness of the sheriff's return on process to justify the decision in the case. It is a rule that antedates Magna Charta. Apparently, there are precedents that carry us back at least five centuries in support of this rule. In 16 Columbia Law Review 281 *et seq.* will be found an article in which this question is fully considered, and in which it is shown that the rule in respect to the conclusiveness of a sheriff's return has been in force since the reign of William the Conqueror.

The due process clause in our Constitution was therefore never intended to affect the rule or restrict its application. It was in fact then a part of the "law of the land" and therefore consistent with due process.

D.

Ancient usage in England and the Colonies did not sanction the determination of one's rights in property, in an instance such as this, without notice to him.

It does not follow that because in a few instances, according to the settled usages and mode of proceedings existing in the common and statute law of England for centuries, notice was not an indispensable prerequisite to due process, or "the law of the land," that notice may be dispensed with, in an instance where, according to the common and statute law of England, the American Colonies and the States, prior to the passage of Torrens laws, notice and a hearing were always required.

The fact that during the last century, in countries where the Government is not restrained by constitutional limitations, land registration acts have met with the approval of the courts, is not an argument for the validity of a provision for conclusiveness in certificates of title in States whose agencies are prohibited by constitutional limitation from depriving persons of property without due process of law. Nor, for the same reasons, do we consider important the system of registration of titles in force in early times in countries other than England. Governmental power in such countries was absolute, while the written American Constitution is the result of a long struggle by English speaking people to place restraints upon the absolute power of the Government.

Whether the Australian system of land registration of titles is superior to other methods is not the question here. The question is whether that system, if put into operation in the States of the United States, must not be modified, in so far as the conclusive effect of the certificate is concerned, to meet the constitutional requirements of the due process clause of the Fourteenth Amendment.

It is argued that the Fourteenth Amendment does not prohibit a change in the laws. That we admit, but we submit that the statement of Chief Justice Taft in Truax v. Corrigan, 257 U. S. 312, at p. 338, is pertinent:

> "When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual."

We therefore submit that a change in the laws cannot be accomplished by State legislation, consistently with due process of law, where such change involves the denial or disregard of a fundamental principle protecting the citizen in his private rights and intended to guard him against the arbitrary action of government or government agencies. And we further contend that one of those fundamental principles is the right of the citizen to notice and an opportunity for hearing in any proceeding, whether administrative or judicial, the determination in which involves title to his property.

Some reliance is placed by appellees upon recording laws as furnishing authority for upholding Torrens Acts, but under recording laws one's title cannot be transferred to another without his consent by the Recorder, nor does one lose his title, except by failure to timely record his deed,—a personal omission,—or through the operation of a limitation law, or by due process of law.

We do not find in appellees' brief any mention of any instance in which in England, or in the American Colonies, or in the States, before the passage of Torrens Acts, there was in force any law, customary or written, making conclusive a certificate of title to real estate issued by a public officer, except possibly the one statute in Massachusetts referred to on pp. 57 and 58 of appellees' brief. As illustrating the unconstitutionality of such a law, we refer to the tax deed cases on pages 22-23 hereof.

The writer is unfamiliar with Massachusetts Colonial laws relating to real estate, and has been unable to ascertain whether the Massachusetts statute referred to merely operated as a grant from the Colony to the persons whose names were recorded in pursuance of the statute, or what construction was given to the statute, and whether notice was given, or whether the court into which the transcript was to be returned was a legislative or judicial body, and whether a hearing was permitted on the return in the court or not. Apparently, however, there was nothing in the statute which precluded any one from asserting at any time any rights he might have. But be that as it may, the one instance referred to is of too isolated and uncertain a character to lead one to the conclusion that it was a *settled* usage and mode of proceeding, and therefore consistent with due process of law. (See Twining v. New Jersey, 211 U. S. 78, 108.)

Many of the matters relied upon by appellees as affording warrant for the assertion that analogies may be found in the common law or the statutory law of England or the American Colonies for the *immediate* conclusiveness of Torrens Certificates, will be found, upon examination, to be but instances of mere limitation laws. For instance, a fine at common law is referred to as analogous, but a consideration of the method by which a fine was levied will illustrate at least two important differences, differences with respect to the very things of which appellants complain.

First: Fines were an effectual guarantee against forgery.

II. Pollock & Maitland, History of English Law (1895), 100.

III. Holdsworth, History of English Law (3rd Ed.), 245.

Second: As pointed out by Pollock & Maitland, *supra*, pp. 94-105, a freeholder could not be *disseized* without notice and opportunity to be heard.

See also Holdsworth, Historical Introduction to the Land Law (1927), 116.

The first essential of the fine was a writ in which all of the property to be dealt with must be mentioned. After the parties, one of whom must have been seized of the land, had been brought before the court by the sheriff, they stated the terms of their compact. Four justices at least should be present at the time the "concord" was entered into. The courts of those times were local courts, and the freeholders of the district were bound to attend them so that notice to all persons interested was thus obtained. Moreover, the fine was not binding until a year and a day after seizin had been given by the sheriff, a period copied from the law of the old Germanic nations. That protection is similiar to that usually accorded by statutes (including Torrens Acts with reference to *initial* registrations) allowing judgments obtained after notice by publication to be opened within a stated period of limitation by parties not originally appearing, but whose interests are sought to be bound.

II. Pollock & Maitland, History of English Law, pp. 95-105.

III. Holdsworth, History of English Law, pp. 236-245.

The procedure in the case of a fine was not dissimilar to the initial registration in a Torrens proceeding, and to that extent it is somewhat analogous. The above mentioned safeguards of a fine later were found not to be sufficiently stringent. By the statute of non-claim enacted in 1360 (34 Edward III. c. 16), it was provided that a fine should not affect the rights of persons not parties to the action, but in Henry VII's time (4 Henry VII c. 24) a fine again was made conclusive against all, *after five years,* but it probably could be levied only by proclamation, perhaps comparable to modern notice by publication.

III. Holdsworth, History of English Law, pp. 243-244.

The borough customs, also mentioned by appellees, were only methods of executing deeds of conveyance and were not in any sense assurances of title. And as shown by the arti-

cle in 19 Green Bag, 335, 338, the deed only attained binding effect after being proclaimed in open court and the inhabitants of the borough were charged with notice of the proceedings in such court.

The transactions in the instances above were not supervised by "an officer of the court," as stated by the appellees, but by the court itself, with either notice to all parties provided for, or with its equivalent, the inhabitants of the district attending the court.

It is also asserted that various incidents of tenure in the early land laws of England imposed burdens upon the tenant which historically justify the Torrens Act in providing for the conclusiveness of a certificate of title. But will it be asserted that in a country where the land owner is guaranteed due process of law by a written Constitution before being deprived of his property, and where a State can not even exercise its necessary power of taxation except after giving notice or affording a review (see authorities p. 27, *supra*) that the many charges or burdens mentioned in appellees' brief, and which were incidents of tenure to land in England in the early period of the common law, may be imposed by a State upon one who is an owner of his land in fee simple?

E.

The statute cannot be upheld as a limitation law, because it does not afford a reasonable opportunity to the party to be affected to assert his rights.

Certainly limitation laws were known to the common law, and we do not question the constitutionality generally of limitation laws. But one of the fundamental constitutional requirements of a valid statute of limitations is that it affords a reasonable opportunity to the party to assert his rights.

A limitation statute which does not do this is invalid as not affording due process of law.

Ochoa v. Hernandez Y. Morales, 230 U. S. 139, 161.
2 Cooley Constitutional Limitations (8th ed.) 760-765.

As Sections 40 and 42 of the Act here in question, do not, nor does any other section of the statute, fix a time within which the owner whose land has been wrongfully transferred to another by the Registrar may assert and protect his rights by appropriate action, they cannot be upheld as valid limitation laws under the authorities cited above. Indeed, giving Sections 40 and 42 effect as limitation laws, in a case such as this, would mean that a law could be upheld as a limitation law, though the act which gave rise to the necessity of invoking the protection of the courts also tolled the right to resort to the courts.

Reference is made in several instances by counsel for the Registrar to that part of the opinion in Tyler v. Judges of the Court of Registration, 175 Mass. 71, upholding the constitutionality of the provisions of the Massachusetts Torrens Act regarding transactions subsequent to the initial registration. The Massachusetts law provided that a registration procured by presenting a forged certificate or a forged deed or other instrument should be void. (175 Mass. 81; our original brief p. 14.) Under such a law appellants in this case would not be precluded by the Registrar's transfer. The Massachusetts law also provided that all of the business was to be done "in accordance with the rules and instructions of the court," and the court construed that law as requiring, if there was any question, it should be referred to the judge for decision. (175 Mass. 81.) It was with reference to such an Act that it was said in the opinion that, "The

Act shows throughout the intent that no one shall be concluded without having a chance to be heard, and, although some of its methods are new to this Commonwealth, we cannot say that the precautions as to notice are insufficient in substance or form." (175 Mass. 81.)

We submit, that the Massachusetts court did not mean by the statement in its opinion that "when land is brought into the registry system there seems to be nothing to hinder the Legislature from fixing the conditions upon which it shall be held under that system," (175 Mass. 81) that the Legislature could require a waiver of constitutional guarantees from one purchasing such land or that, in the case of a subsequent registration, a registered owner could, in case of an unauthorized transfer, be deprived of his property by the Registrar's action without notice and a hearing. The references in the opinion to the fact that the Act provided that a registration procured through forgery should be void and also to the fact that the Act throughout showed an intent that "no one shall be concluded without having a chance to be heard," preclude such a contention. That opinion, as we read it, does not afford justification for the assertion that a transfer by the Registrar contrary to the terms of the law, without notice or a hearing, binds the true owner, or that the Massachusetts Court ever intended to be understood as so holding.

CONCLUSION.

We submit that the opinion of the court below sufficiently shows that there was drawn in question the validity of the Sections 40, 42 and 46 of the statute, as construed and applied, on the ground that it was repugnant to the provision of the Federal Constitution prohibiting a State from depriving a person of property without due process of law, and that such question is a substantial one, and the Court, therefore, has jurisdiction of this appeal.

We further submit that it is manifest the statute, as construed and applied by the court below, does deprive appellants of their property without due process of law, and that the consent to the deprivation of constitutional rights which the court below implied from Sec. 46 of the Act cannot be given effect.

Therefore, the judgment below is erroneous and should be reversed.

Respectfully submitted,

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